LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1958

No. 966

STATE OF NEW MEXICO, Petitioner

vs.

NELSON H. BEGAY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

FRED M. STANDLEY,
Attorney General of New Mexico
ROBERT F. PYATT,
Assistant Attorney General
ALFRED P. WHITTAKER,
Assistant Attorney General
Attorneys for Petitioner

EASTWOOD PRINTING CO. * 1554 LARIMER * DENVER 2, COLO.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	5
Reasons Relied on for Allowance of Writ	7
Conclusion	13
Appendix A	14
Appendix B	20

CASES CITED

In re Fredenberg, 65 F. Supp. 4	12
Konaha v. Brown, 131 F. 2d 737	12, 13
State v. Tucker, 237 Wis. 310, 296 N.W. 645	12, 13
U. S. v. Okla. Gas & Electric Co., 318 U. S. 206, 63 S. Ct. 534	10

STATUTES

Constitution of New Mexico, Art. XXI, § 2	2, 8
Enabling Act for New Mexico, § 2, Second Provision	3
18 U.S.C.A. §1151	5, 7, 9, 12
25 U.S.C.A. §311	7, 10, 12
28 U.S.C.A. § 1257 (3)	2

IN THE

SUPREME COURT OF THE UNITED STATES

..... Term, 1958

No. .....

STATE OF NEW MEXICO, Petitioner

vs.

NELSON H. BEGAY, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, State of New Mexico, hereby petitions for a Writ of Certiorari to review the decision of the Supreme Court of New Mexico denying unto Petitioner the right and jurisdiction to enforce its laws pertaining to the use of state public highways within the exterior boundaries of that portion of the Navajo Indian

Reservation in New Mexico, in so far as Navajo Indians are concerned.

OPINIONS BELOW

The opinion below has not been officially reported, but is reported at 320 P. 2d 1017 (Advance Sheet No. 3). The opinion is appended hereto as Appendix A.

JURISDICTION

The order sought to be reviewed, affirming the judgment of the District Court of San Juan County, New Mexico, was dated January 22, 1958, and is appended hereto as Appendix B. On February 13, 1958, an order was entered denying Petitioner's Motion for Rehearing. The mandate was issued the same day. The statutory provision believed to confer jurisdiction upon this Court is 28 U.S.C.A. § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Navajo Indian, by virtue of his race or status, is immune from prosecution in the Courts of New Mexico for such offenses as driving while intoxicated, driving after revocation of driver's license, and being involved in an accident while driving when intoxicated, committed by him while using a state highway within the exterior boundaries of the Navajo Reservation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of New Mexico, Article XXI, § 2:

> "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying

within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe."

Enabling Act for New Mexico, § 2, Second Provision, (36 Stat. 557, 558):

"Second. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or

from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

25 U.S.C.A. § 311 (31 Stat. 1084):

"The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not

been conveyed to the allottee with full power of alienation. (Mar. 3, 1901, c. 832, § 4, 31 Stat. 1084)"

18 U.S.C.A., § 1151 (62 Stat. 757; 63 Stat. 94):

"Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757, amended May 24, 1949, c. 139, § 25, 63 Stat. 94."

STATEMENT OF THE CASE

Nelson H. Begay, a Navajo Indian, was arrested May 7, 1957, by an officer of the New Mexico State Police on Highway No. 666 in San Juan County, New Mexico, within the exterior boundaries of the Navajo reservation. Begay was charged with three violations of state law, namely: (1) driving while intoxicated; (2) driving after revocation of driver's license; and (3) being involved in an accident while driving when intoxicated. The charges were made before the Justice of the Peace, Precinct 13, County of San Juan, State of New Mexico. Trial was had and Begay was convicted. Incarceration in the county jail followed.

Begay filed his Petition for Writ of Habeas Corpus in the District Court of San Juan County, (R. 2), (which

refers to the typewritten Transcript of Record prepared and certified to by the Clerk of the Supreme Court of New Mexico, filed herewith, and to which reference is hereafter made herein), alleging under the circumstances reviewed above that all state courts lacked jurisdiction over the subject matter of the aforesaid three offenses; that instead, jurisdiction over said offenses was vested in the courts of the United States, or those of the Navajo Tribe; and that as a result, the judgment of the Justice of the Peace was a nullity and without jurisdiction. The federal question was thus initially presented.

The District Court of San Juan County issued its Writ of Habeas Corpus, directed to the Sheriff. Return thereto was duly made. After hearing, the Court issued its order (R. 9) finding that the aforesaid Justice of the Peace had no jurisdiction to try and convict Begay of the crimes charged; that Begay was thus deprived of liberty without due process of law; and was ordered released from custody and restored to liberty.

A Stipulation was entered into and introduced into evidence (R. 18). This disclosed the location of Highway 666 through the Navajo Reservation, and also Interior Department approval thereof.

The State of New Mexico challenged the ruling on the jurisdiction of its courts, and perfected its appeal to the Supreme Court of New Mexico. The appeal was solely on jurisdictional grounds, as is revealed by New Mexico's sole point relied upon for reversal (R. 21). The federal question was in this manner presented to the Supreme Court of New Mexico. The judgment of the Supreme Court of New Mexico, reviewed above, followed in due course.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

1. That the Supreme Court of New Mexico has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States.

2. That said Federal question should be settled by the Supreme Court of the United States.

POINT I

THE GRANT BY THE SECRETARY OF THE INTERIOR OF A HIGHWAY EASEMENT, PURSUANT TO 25 U.S.C.A. § 311, CONFERS JURISDICTION UPON THE COURTS OF THE GRANTEE STATE TO ENTERTAIN PROSECUTIONS FOR HIGHWAY VIOLATIONS.

The opinion of the Supreme Court of New Mexico interpreted 25 U.S.C.A. § 311, and the grant pursuant thereto of an easement to construct Highway 666 through the Navajo reservation, as having failed to extinguish the title of the Navajo Tribe of Indians. We are not unmindful that 18 U.S.C.A. § 1151 employs the language:

> ". . . including rights-of-way running through the reservation . . ."

But for reasons hereinafter developed, we do not believe the latter language negates Petitioner's position.

While the opinion below does not expressly so hold, it is clear from a perusal thereof that the denial of jurisdiction over Begay, under the circumstances here presented, was founded solely upon Begay's race. Based upon what we submit is erroneous interpretation of federal law, the decision of the Supreme Court of New Mexico accords a

privileged position to many of New Mexico's citizens solely because of race.

It would do violence to the rules of this Court to cite and expound upon the plethora of cases requiring the several states to accord racial equality. And this is nowhere more certain and settled than in the field of law enforcement. Yet what has the Supreme Court of New Mexico done? It has placed the Navajo citizens of this State upon a pedestal above the law. In the confines of the Navajo reservation, those citizens may engage in drunken driving and other highway offenses with impunity. They may violate, with defiance, laws enacted for their protection, when under exact circumstances, the English-speaking and Spanish-speaking citizens of New Mexico would be subject to severe penalties.

With this state of affairs in mind, can it be gainsaid that the Supreme Court of New Mexico has not decided a federal question of substance under 25 U.S.C.A. § 311? It has not been heretofore determined by this Court.

The Supreme Court of New Mexico held that Congress has absolute jurisdiction over Indian lands in New Mexico, until the Indian title is extinguished, citing Constitution of New Mexico, Article XXI, § 2. And further that the highway easement at bar had not served to extinguish said title. But it is always to be emphasized that said section of the New Mexico Constitution, and § 2 of the Enabling Act, provide in part:

> " . . . and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; . . . "

True, such provisions prevent *unauthorized* encroachment

by Petitioner upon Indian lands. But no such encroachment has at any time been sought. Our position is that Congress *has authorized*, by 25 U.S.C.A. §311, an extinguishment of title, to the extent an easement accomplishes such. Hence, the easement upon which Highway 666 is located is no longer under absolute Congressional jurisdiction. Neither the Constitution of New Mexico nor the Enabling Act prevent Petitioner's claim of jurisdiction which is consistent in all respects with the federal grant authorized by Congress.

It is most important that it be kept in mind when Petitioner acquired her easement through the Navajo reservation. The approval was granted April 29, 1926. (R. 18). It is true that 18 U.S.C.A. § 1151 refers to rights of way, as quoted supra, which language, however, was added by amendment of June 28, 1932. Hence, Petitioner's rights were acquired almost seven years prior to the amendment, but Congress, in the enactment thereof, made no mention of existing rights of way owned by the several states. In the absence of an expression of congressional intent to disturb Petitioner's vested right, it is hardly to be inferred that such was intended. Accordingly, the definition of Indian country, set forth by 18 U.S.C.A. § 1151, insofar as the rights of way language is concerned, can have no bearing on this case. In addition, it is to be observed that in order for *any* area to be "Indian country" under the statute, it must in any event be territory ". . . under the jurisdiction of the United States government, . . ." Viewed in proper perspective with our above argument that both the Enabling Act and Constitution of New Mexico contemplate that Congress may authorize a divestiture of Indian title, and hence federal jurisdiction, 28 U.S.C.A. § 1151 becomes of little significance once an easement was granted pursuant to 25 U.S.C.A. § 311. In brief, the easement dis-

placed the Indian title, and to that extent the previously existing federal jurisdiction, so that New Mexico may enforce its laws designed for the protection of the traveling public.

To view the matter otherwise is to make a mockery of the right of way grant to Petitioner. By necessary implication, said grant carried the right to enforce laws necessary to protect travelers on the highway, and indeed, the highway itself. For this Court to permit the decision of the Supreme Court of New Mexico to stand would be to attribute to Congress, and the Secretary of the Interior, not only a useless act, but an invitation to wholesale lawlessness on state highways running through Indian reservations.

While research has not disclosed that this Court has passed upon this exact issue, we submit the case is controlled in principle by *United States v. Oklahoma Gas and Electric Co.*, 318 U.S. 206, 63 S. Ct. 534. The question for determination was whether the grant of permission to the State of Oklahoma to establish a highway over allotted Indian lands given under 25 U.S.C.A. § 311, included the right of Oklahoma, in turn, to permit maintenance of electric lines within the highway right of way. The Secretary of the Interior approved the grant on January 20, 1928. The United States brought suit against the utility seeking declaratory relief. The district court dismissed the complaint, and the circuit court of appeals affirmed. Because of the importance of the question to the administration of Indian affairs, certiorari was granted. If we may digress from the case momentarily, it seems to us the instant case involves a question equally, if not more, " . . . important to the administration of Indian affairs . . . ", and certainly should be finally determined by this Court. In the opinion, considerable stress was laid upon the language: " . . . in

accordance with the laws of the State or Territory in which the lands are situated . . . ", and it was held that there was no reason to believe Congress intended to grant to Oklahoma a *limited power* in a matter so commonly subject to local control. This we submit is the exact argument now propounded by Petitioner. Can it logically be said that Congress and the Secretary of the Interior in granting New Mexico the right to construct Highway No. 666 across the Navajo reservation, intended a grant of *limited power* in a matter so commonly subject to local control as the enforcement of laws relating to proper use of highways? Yet the decision by the Supreme Court of New Mexico denies even limited power insofar as Begay is concerned. Then this Court held that the explicit reference in the Act to state law indicated the answer to the issue *was to be found in the state law*. And so here, New Mexico's law relating to the offenses of which Begay was convicted are broad and general in scope. We state unequivocally that said laws contain no exceptions founded upon race, and no exceptions of Indian reservations. Very interesting is the Court's continued reasoning that under its construction of the statute, Indians were subjected to the same rule of law as others in Oklahoma. Again applying the Court's reasoning to Petitioner's case, under the position urged by us, Indians will be subjected to the same rule of law as others, and the ugly spectre of racial favoritism will vanish. Then the Court delved into the practicalities of the situation, pointing out how large areas in Oklahoma were held in trust for allottees, and that complications and confusion would follow if different rules were applied to highways crossing Indian lands. Yet this reasoning is also most apropos in the instant case. We respectfully request the Court to take judicial notice of what is realized by all—that large areas of New Mexico consist of Indian reservations, many of which are traversed by arterial high-

ways of national importance. Different rules in these areas, as to enforcement of criminal laws applicable to the use of highways, would not only place an intolerable burden upon Petitioner, inconsistent with its status as a sovereign state, but would grossly jeopardize the lives and limbs of all highway users, Indians as well as others. Interestingly, 18 U.S.C.A. § 1151 was not even mentioned.

In three instances, other than this Cause, has this matter been litigated. We shall review the cases but briefly—to do otherwise would unduly extend this Petition.

In *State v. Tucker*, 237 Wis. 310, 296 N.W. 645, a highway right of way had been granted by the Secretary of the Interior to Wisconsin to construct a highway through an Indian reservation. Defendant was a tribal Indian, living on the Menominee reservation. The question was whether Wisconsin could require him to register his truck and pay a fee for its operation on a state highway within the exterior boundaries of the reservation. In affirming the conviction, the Supreme Court of Wisconsin held that the grant pursuant to 25 U.S.C.A. § 311 carried by necessary implication the right to police the road, and the fact that it was a public highway implied that no person, Indian or white, could use it except on the same conditions as the general public.

On the other hand, *In re Fredenberg*, 65 F. Supp. 4, held contra to the *Tucker* case, devoting a large portion of its opinion to a criticism of the *Tucker* decision.

The case of *Konaha v. Brown*, 131 F. 2d 737, involved the question of whether a Tribal Indian could be prosecuted in state court for negligent homicide, for killing another Indian on a state highway within the exterior boundaries of the Indian's reservation. The nature of the crime (a felony), appeared to be of paramount importance, since

the *Tucker* case was distinguished on the grounds it involved a motor vehicle offense, while in the *Konaha* case the crime of manslaughter was the offense. On this basis, the court in *Konaha* said the crime was under the Ten Major Crimes Act (See 18 U.S.C.A. § 1153, not here involved), and hence only the federal courts had jurisdiction. We agree. At any rate, the *Konaha* opinion contains language which, while perhaps dicta, is favorable to Petitioner, since it was said that the right to maintain a highway carried by implication the right in the state to enforce penal provisions serving to protect the highway, such as speeding and impairing the highway. Begay was convicted of three offenses heretofore recited. How can it be said, consistent with reason, that these three offenses were not of the very class or nature said by *Konaha* to be matters for state jurisdiction and enforcement?

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

FRED M. STANDLEY,
Attorney General of New Mexico,
ROBERT F. PYATT,
Assistant Attorney General,
ALFRED P. WHITTAKER,
Assistant Attorney General,
Attorneys for Petitioner.

Appendix "A"

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellant,

vs.

NELSON H. BEGAY,
Defendant-Appellee.

No. 6292

[Filed January 22, 1958.]

Appeal from the District Court of San Juan County, McCulloh, Judge

Fred M. Standley, Atty. Gen., Frank H. Patton, Special Asst. Atty. Gen., Robert F. Pyatt, Asst. Atty. Gen., Santa Fe, New Mexico, Attorneys for Appellant.

Tansey & Rosebrough, Farmington, New Mexico, Attorneys for Appellee.

OPINION

KIKER, Justice.

The appellee, Nelson H. Begay, is a Navajo Indian who was arrested on May 7, 1957, by an officer of the New Mexico State Police on the right of way of U. S. Highway 666, south of Shiprock, New Mexico, and within the exterior boundaries of the Navajo Reservation. He was taken to the office of the justice of the peace for Precinct No. 13, County of San Juan, State of New Mexico, and charged

with three violations of state law, to-wit: driving while intoxicated, driving after revocation of driver's license, and being involved in an accident while driving when intoxicated.

Appellee was tried and convicted of the charges in the justice of the peace court and interned in the county jail. On May 27, 1957, appellee filed his petition for writ of habeas corpus in the district court of San Juan County and prayed for his release from imprisonment. Appellee in his petition challenged the jurisdiction of the state courts over the subject matter and contended that the judgment of the justice of the peace was a nullity.

The district judge issued the writ of habeas corpus directed to the sheriff directing that the body of the appellee be produced at the court house at Aztec, New Mexico, for hearing. At the hearing the court held that the justice of the peace was without authority or right to impose the sentence on the appellee and that he had been deprived of his liberty without due process of law. The court ordered appellee be released and restored to his liberty. Appeal was taken from such order and judgment of the district court.

Highway 666 was constructed under a grant from the United States to the State of New Mexico of an easement to the land for the right of way under discussion herein. A map was introduced in evidence at the hearing on the Petition for Writ of habeas corpus which describes this particular highway and upon which the right of way is delineated. This map bears a notation of approval of the Department of the Interior of the United States which reads, as follows:

> "Department of the Interior, April 29, 1926, approved as of date of December 23, 1925, subject to the pro-

vision of the Act of March 3, 1901 (31 Stat. L. 1058. 1084) Department regulations thereunder; and subject also to any prior valid existing right or adverse claim.

/2/ William H. Edwards
William H. Edwards
Assistant Secretary."

The Department regulation cited in the approval is Title 25 U.S.C.A. 311, reading:

"The Secretary of the Interior is authorized to grant permission, upon the compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been alloted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation. (Mar. 3, 1901, c. 832, Sec. 4, 31 Stat. 1084)."

The approval granted by the Department of the Interior to the state to construct Highway 666 was subject to the provisions of 25 U.S.C.A. 311 which authorizes the Secretary of the Interior " * * * to grant permission * * * for the opening and establishment of public highways * * *." Nothing more than an easement granted to the state can be found here. An easement is distinguished from a fee and constitutes a liberty, privilege, right or advantage which one has in the land of another. 28 C.J.S. 619, 623.

The State of New Mexico lacks jurisdiction over Indian lands within the state until and unless the title of the Indian or Indian Tribes shall have been extinguished. Until such extinguishment of title, the lands involved are sub-

ject to the absolute jurisdiction and control of the Congress of the United States. Constitution of New Mexico, Art. XXI, Sec. 2. We hold that the authority under which the State was permitted to construct Highway 666 through, and over, the Navajo Indian reservation failed to extinguish the title of the Navajo Indian Tribe.

The appellant relies heavily upon the case of State v. Tucker, 237 Wis. 310, 296 N. W. 645. That case also involved a highway right of way through an Indian reservation granted to the State by the Department of the Interior. The court held that the permission given to construct and maintain the highway by the Secretary of the Interior under 25 U.S.C.A. 311 destroyed the Indian's title to the land included in the highway right of way. Thus, with the title in the Indians extinguished, the land came under the jurisdiction of the state. State v. Tucker, adopted a rule of law which was taken from the earlier cases of Johnson v. McIntosh, 8 Wheat. 543, 5 L. ed. 681; Veeder v. Guppy, 3 Wis. 502; Beecher v. Wetherby, 95 U.S. 517, 24 L. ed. 440. Generally, these cases hold that the title of the Indians was a right of occupancy, a possessory right, and not a fee. In State v. Tucker the court went further and said that when the United States granted permissive use to the State it had the effect of extinguishing the title in the Indians and, therefore, the land in question came under the jurisdiction and control of the State.

In the case of Ex parte Konaha, 43 F. Supp. 747, a Menominee Indian was charged with negligent homicide as a result of driving his automobile while under the influence of alcoholic beverages and causing the death of another Indian of the Tribe. The incident upon which the charge was based took place on a portion of State Highway 47 in Wisconsin which is located entirely within the boundary of the Menominee Indian Reservation. Upon his

conviction, Konaha filed an application for writ of habeas corpus. The court considered the decision in State v. Tucker and found that decision to be unsound and considered it not binding.

State Highway 47 was again involved in the case of In re Fredenberg, 65 F. Supp. 4. There, a Menominee Indian was convicted of violating a state statute which prohibited the operation of an unregistered motor vehicle on a state highway. Upon application for a writ of habeas corpus, the petitioner contended, much the same as the appellee argues in the instant case, that since the alleged offense occurred upon that portion of the highway which was constructed upon the Indian reservation by the state with the permission of the federal government under authority of 25 U.S.C.A. 311, the state was without jurisdiction. The court specifically stated at page 5 that State v. Tucker was decided wrong and continued at page 6 to say:

> "I believe it is now firmly established that the Indian title is equivalent to beneficial ownership and I believe that the granting of an easement for the purpose of constructing and maintaining a highway did not extinguish the Indians' underlying title. By the establishment of the highway the existing relationship of the Indians to the State was not altered. The easement which the State has to construct and maintain the highway is limited in character. The State accepted the easement on that limited basis.
>
> "* * * There is no legitimate implication to be drawn that Congress intended any grant of jurisdiction when it permitted the State primarily for its own convenience to establish a State highway across the reservation."

In re Fredenberg presents the same problem that we

have before us here. In the instant case when the federal government permitted the State to construct a highway across the Indian reservation it did not extinguish beneficial title in the Indians. Since the State has no jurisdiction over Indian reservations until title in the Indians is extinguished, and the easement to the State did not affect the beneficial title, there is no basis upon which the State can claim jurisdiction.

The appellant cites much authority in an attempt to sustain its contention that the State did have jurisdiction in this matter. In re Fredenberg deals, however, with this very same problem. The facts in that case are the same as we have here with only the state statute violated being different. We feel that we must be guided by so similar a case, so carefully thought out. The judgment of the lower court should be affirmed.

IT IS SO ORDERED.

/s/ H. A. Kiker, Justice.

WE CONCUR:

/s/ Eugene D. Lujan, C. J.

/s/ James B. McGhee, J.

/s/ J. C. Compton, J.

Sadler, J., not participating.

Appendix "B"

ORDER AFFIRMING JUDGMENT

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now sufficiently advised in the premises announces its decision by Mr. Justice Kiker, Chief Justice Lujan, Mr. Justice McGhee and Mr. Justice Compton concurring, Mr. Justice Sadler not participating, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file:

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court within and for the County of San Juan, whence this cause came into this Court, be and the same is hereby affirmed, and the cause is remanded to the said District Court of San Juan County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUN 10 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 966

STATE OF NEW MEXICO, *Petitioner*

v.

NELSON H. BEGAY

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

NORMAN M. LITTELL
1826 Jefferson Place, N. W.
Washington 6, D. C.

LAURENCE DAVIS
1410 N. Central Avenue
Phoenix, Arizona

CHARLES M. TANSEY, JR.
Nye Building
108 North Orchard
Farmington, New Mexico

CHARLES J. ALEXANDER
1826 Jefferson Place, N. W.
Washington 6, D. C.

INDEX

	Page
Constitutional and Statutory Provisions Involved	1
Question Presented	2
Statement	2
Argument	2
Conclusion	9

AUTHORITIES

Cases:

Blackbird, in re, 109 Fed. 139 (1901)	4
Browning v. United States, 6 F. 2d 801 (C.C.A. 8, 1925), certiorari denied, 269 U.S. 568 (1925)	8
County Commissioners v. Seber, 318 U.S. 705 (1943)	8
Denetclaw, Application of, 83 Ariz. 299, 320 P. 2d 297 (1958)	10
Donnelly v. United States, 228 U.S. 243 (1913)	8
Fredenberg, in re, 65 F. Supp. 4 (1946)	7, 10
State v. Began, 320 P. 2d 1017 (N.M., 1958)	9
State ex rel Irvine v. District Court, 125 Mont. 398, 239 P. 2d 272 (1952)	8
State v. Jackson, 218 Minn. 429, 16 N.W. 2d 752 (1944)	4
State v. Rufus, 205 Wisc. 317, 237 N.W. 67 (1931) ...	4
United States v. Hamilton, 223 Fed. 685 (1915)	4
United States v. Kagama, 118 U.S. 375 (1886)	4
United States v. McGowan, 302 U.S. 535 (1938)	8
United States v. Nice, 241 U.S. 591 (1916)	8
United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943)	8
United States v. Shoshone Tribe, 304 U.S. 111 (1938)	7
Williams v. United States, 327 U.S. 711 (1946)	4

Constitution, Statutes, Treaty:

Acts of Congress:

March 4, 1909 (35 Stat. 1151)	5
June 7, 1924 (43 Stat. 606)	7
June 28, 1932 (47 Stat. 336)	5

Page

May 28, 1941 (55 Stat. 207) 7
June 25, 1948 (62 Stat. 683) 7, 8
April 19, 1950 (64 Stat. 44) 3
June 4, 1956 (70 Stat. 249) 7

Constitution of New Mexico

Article XXI, § 2 3

Criminal Code of 1909

18 U.S.C., 1926 ed., § 548 5

Criminal Code of 1948

18 U.S.C. § 13 9
18 U.S.C. § 1151 ..... 2, 4, 7, 8, 9
18 U.S.C. § 1152 ..... 1, 2, 3, 4, 8, 9
18 U.S.C. § 1153 4

Navajo Tribal Traffic Code (Navajo Tribal Council Resolutions, vol. IV, pp. 74-82) 9
Treaty of June 1, 1868 (15 Stat. 667) 3
United States Code (other than Criminal Code)
25 U.S.C. § 311 4

TEXTS, MISCELLANEOUS:

Cohen, Felix S., *Handbook of Federal Indian Law*, United States Government Printing Office, 1941 .. 5
Corpus Juris Secundum, vol. 28, "Easements," § 1 7
House Report No. 204, 80th Congress, 1st Session .. 7

Supreme Court of the United States

OCTOBER TERM, 1957

No. 966

STATE OF NEW MEXICO, *Petitioner*

v.

NELSON H. BEGAY

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions set forth in the petition for writ of certiorari are adopted herein, and supplemented as follows:

18 USC § 1152 (62 Stat. 757)

> "Except as otherwise expressly provided by law the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. June 25, 1948, c. 645, 62 Stat. 757."

QUESTION PRESENTED FOR REVIEW

The statement of the question presented is set forth in the petition for certiorari is adopted herein, viz.:

1. Whether a Navajo Indian, by virtue of his race or status, is immune from prosecution in the Courts of New Mexico for such offenses as driving while intoxicated, driving after revocation of driver's license, and being involved in an accident while driving when intoxicated, committed by him while using a state highway within the exterior boundaries of the Navajo Reservation.

STATEMENT OF THE CASE

The Statement of the Case set forth by the petitioner is adopted herein in its entirety.

ARGUMENT

The first reason alleged by the State of New Mexico why this court should issue a writ of certiorari appears to be true, viz.: that the Supreme Court of New Mexico has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States. The second reason alleged by the State, that said Federal question should be settled by the Supreme Court of the United States, however, has no merit.

The Federal statutes defining "Indian Country" (18 U.S.C. § 1151) and declaring exlusive Federal jurisdiction over crimes committed by Indians in such country (18 U.S.C. § 1152) are so clear and so patently conclusive against the State's contentions as to require no further judicial construction.

The Criminal Code of the United States (18 U.S.C. § 1151) defines "Indian country" as including:

> ". . . all land with the limits of any Indian Reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation . . ."

The land on which the Begay's offenses, if any, occurred, is within the limits of the Navajo Indian Reservation in New Mexico, as established by the Treaty between the United States of America and the Navajo Tribe of Indians signed June 1, 1868, and proclaimed August 12, 1868 (15 Stat. 667).

The Navajo Indian Reservation in New Mexico is under the jurisdiction of the United States government. New Mexico Constitution, Article XXI, § 2; Act of April 19, 1950 (25 U.S.C. §§ 631-640); consequently, it is "Indian country" within the meaning of the Federal Criminal Code.

Section 1152 of the Federal Criminal Code (18 U.S.C.) states:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

> "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

It has been uniformly held by the Federal courts that Federal jurisdiction over offenses committed by or against Indians in Indian country is exclusive,[1] and not concurrent with State jurisdiction. *United States* v. *Kagama*, 118 U.S. 375 (1886); *Williams* v. *United States*, 327 U.S. 711 (1946). This rule applies not only in cases of the "ten major crimes" (see 18 U.S.C. § 1153), but in all criminal cases—misdemeanors as well as felonies. *In re Blackbird*, 109 Fed. 139 (1901); *United States* v. *Hamilton*, 233 Fed. 685 (1915); *State* v. *Rufus*, 205 Wisc. 317, 237 N.W. 67 (1931); *State* v. *Jackson*, 218 Minn. 429, 16 N.W. 2d 752 (1944).

The State of New Mexico now contends, however, that the grant to it by the Secretary of the Interior pursuant to 25 U.S.C. § 311 of permission to open and establish Highway 666 across the Navajo Indian Reservation conferred jurisdiction on the State courts to enforce the New Mexico traffic code against Indians, notwithstanding the express inclusion in 18 U.S.C. § 1151, quoted above, defining Indian country, of rights of way running through Indian reservations. The

---

[1] The Federal jurisdiction is exclusive of State jurisdiction, but concurrent with Tribal jurisdiction. Note the exception in 18 U.S.C. § 1152 as to "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe."

basis of the State's contention seems to be that this grant of permission extinguished Indian title.

The tort is, however, that title to the land on which Begay's alleged crimes were committed is immaterial:—

Prior to 1948, "Indian country" was not defined in any Federal statute, although the term was used in numerous sections of the United States Code.[2] Section 328 of the United States Criminal Code of 1909 (35 Stat. 1151, 18 U.S.C., 1926 ed., § 548) stated in part as follows:

> ". . . And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person within the boundaries of any State of the United States and *within the limits of any Indian Reservation*, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States:" [Emphasis supplied]

By the Act of June 28, 1932 (c. 284, 47 Stat. 336) the phrase italicized in the above quotation was amended to read:

> ". . . on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation . . ."

In footnote 9 on page 358 of the *Handbook of Federal Indian Law*, Cohen quotes a memorandum of the

[2] See Felix S. Cohen, Handbook of Federal Indian Law, p. 6.

Solicitor of the Department of the Interior interpreting the amended phrase, as follows:

> ". . . it is my opinion that the amendment should be given its apparent and normal meaning; namely, that the specific reference to rights-of-way was intended to provide for Federal jurisdiction overall rights-of-way running through any Indian reservation . . .
>
> ". . . the amendment was intended to include within Federal jurisdiction all rights-of-way because of the previous division of jurisdiction over rights-of-way in Indian reservations. Prior to the passage of the amendment the courts had concluded that rights-of-way to which the Indian title had not been extinguished remained part of the reservation and within Federal jurisdiction, whereas other rights-of-way to which such title had been extinguished were subject to State jurisdiction. A court would presume that in view of this state of the law any amendment referring to rights-of-way generally would be intended to provide a uniform rule . . .
>
> "Moreover, it would be presumed by a court that this Department and Congress would have been concerned to do away with the unsatisfactory situation resulting from the uncertain status of jurisdiction over rights-of-way on Indian reservations. This would be in conformity with the basic principle of statutory construction that legislation is intended to correct existing evils. The evil in this instance was the uncertainty and confusion resulting from the fact that on each reservation there were a number of rights-of-way, whose ownership status depended on different statutes and regulations and the title to which could be definitely ascertained only through judicial statement, and that, although the title thereto had been determined, there was still the administrative

difficulty arising from differences in jurisdiction over small strips of territory."

When the Criminal Code of the United States was completely revised (Act of June 25, 1948, c. 645, 62 Stat. 683) it was decided to define "Indian country" for purposes of Federal criminal jurisdiction, basing the definition on existing judicial decisions and statutes, of which the amendment of June 28, 1932, *supra*, was one.[3] Consequently, the phrase, "including rights-of-way running through the reservation," was carried forward into the present 18 U.S.C. § 1151.

Thus, it is quite immaterial whether or not the grant of permission by the Secretary of the Interior to the State of New Mexico to open and establish Highway 666 through the Navajo Treaty Reservation extinguished Indian title.[4] The very purpose of mentioning "rights-of-way running through the reservation" in 18 U.S.C. § 1151 was to assert Federal jurisdiction regardless of title status.

---

[3] See Reviser's Note to 18 U.S.C.A. § 1151. This note is taken verbatim from House Report No. 304, 80th Congress, 1st Session.

[4] Actually, the grant did not extinguish the Indian title. Indian title is equivalent to beneficial ownership, which extends to mineral as well as surface rights. *United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938). The permission granted by the Secretary of the Interior to establish Highway 666 across the Navajo Indian Reservation amounted at most to an easement, which is defined as "a right or advantage which one has in the lands of another, it is distinct from the ownership of the land to which it is attached." 28 Corpus Juris Secundum, "Easements," § 1, p. 623. See *In re Fredenberg*, 65 F. Supp. 4, 6 (1946). The permission granted to New Mexico did not even give the State exclusive control of the land surface within the right of way. Congress provided that maintenance work should be done by the Secretary of the Interior using Navajo Tribal funds and Indian labor so far as possible. Act of June 7, 1924 (43 Stat. 606); amended, May 28, 1941 (55 Stat. 207); repealed, June 4, 1956 (70 Stat. 249).

The State, however, contends further that the grant of permission to open and establish Highway 666, made April 29, 1926, conferred upon it a vested right to jurisdiction over Indians, which could not be taken away by subsequent legislation of Congress. See Petition, page 9.

This contention is neither novel nor sustainable. It was raised rather more forcefully than now in the dissenting opinion in *State ex rel Irvine* v. *District Court*, 125 Mont. 398, 239 P.2d 272 (1952), where the majority repudiated it. Federal jurisdiction over Indians' crimes is not dependent on the ownership status of the land where they are committed. *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913); cf. *United States* v. *Nice*, 241 U.S. 591 (1916). And even where Congress has laid aside, or never had, jurisdiction over Indians' crimes, it can retake jurisdiction by unilateral action without State consent. *Browning* v. *United States*, 6 F. 2d 801 (C.C.A. 8, 1925), certiorari denied 269 U.S. 568 (1925); *United States* v. *McGowan*, 302 U.S. 535 (1938). Cf. *County Commissioners* v. *Seber*, 318 U.S. 705 (1943). Even if New Mexico got jurisdiction in 1926 over Indian traffic offenses on Highway 666 within the Navajo Indian Reservation by virtue of the permission given by the Secretary of the Interior to open and establish this road, New Mexico lost this jurisdiction when sections 1151 and 1152 of title 18 of the United States Code (quoted above) were enacted in June 25, 1948.[5]

[5] Since *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943) was decided prior to enactment of the Criminal Code of 1948, it has lost whatever bearing it ever had on the jurisdictional status of highway rights-of-way across Indian lands. See page 10 of Petition.

One further issue attempted to be raised by the State of New Mexico requires comment. It is stated on page 8 of the Petition for Certiorari that Navajo Indians may engage in drunken driving and other highway offenses with impunity within the Navajo Indian Reservation. On page 12 it is stated that the decision which is sought to be reviewed by certiorari grossly jeopardizes the lives and limbs of all highway users. These statements are supported neither by evidence in the record nor by facts outside the record. Actually Navajo Indians within the Navajo Indian Reservation are held to observance of the New Mexico Traffic Code by the Federal Assimilative Crimes Act 18 U.S.C. § 13) and to observance of their own Tribal Traffic Code (Navajo Tribal Council Resolutions, vol. IV, pp. 74-82) by the Tribal police. The Navajo Indian within the Navajo Reservation, because of concurrent Federal and Tribal jurisdiction is policed by at least twice as many law enforcement officers as the non-Indian citizen of New Mexico. The suspicion is strong that the vigorous prosecution of this case by New Mexico authorities is not because of danger to the travelling public, but because of the substantial loss of revenue to the State from traffic fines it cannot now collect under the ruling of its Supreme Court.

CONCLUSION

The plain language of sections 1151 and 1152 of title 18, United States Code, so clearly forecloses State jurisdiction over crimes committed by Indians within Indian Reservation that they need no explanation by this Court. A lower Federal Court and the Supreme Court of Arizona have considered identical questions to the one involved in *State* v. *Begay*, 320 P.2d 1017,

now sought to be reviewed, and have come to identical answers with the Supreme Court of New Mexico. *In re Fredenberg*, 65 F. Supp. 4 (1946); *Application of Denetclaw*, 83 Ariz. 299, 320 P.2d 297 (1958).

The petition for a writ of certiorari should be denied.

NORMAN M. LITTELL
1826 Jefferson Place, N. W
Washington 6, D. C.

CHARLES M. TANSEY, JR.
Nye Building
108 North Orchard
Farmington, New Mexico

LAURENCE DAVIS
1410 N. Central Avenue
Phoenix, Arizona

CHARLES J. ALEXANDER
1826 Jefferson Place, N. W
Washington 6, D. C.

Attorneys for the Respondent